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No. 07-218

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LORENZO PICKETT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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As the government explained in its petition for a writ of certiorari, this case presents the same question as *Kimbrough* v. *United States*, No. 06-6330 (argued Oct. 2, 2007), and the petition should therefore be held pending the Court's decision in *Kimbrough*. In his brief in opposition, respondent acknowledges (Br. 4) that "it appears that [*Kimbrough*] will affect this case," but nevertheless contends (Br. 3-4) that the petition should be denied because it is interlocutory. That contention lacks merit.

The court of appeals in this case held that the district court had erred by refusing to consider the disparity in sentences for crimes involving crack and powder cocaine, and, as a result, remanded the case for resentencing. See Pet. App. 7a-18a. Since the court of appeals' decision, however, the district court has not taken

any action on remand, nor has respondent asked it to do so—and, even if he did, it is unlikely that the district court would proceed with resentencing before *Kimbrough* is decided. Because the government is asking the Court merely to hold this petition pending its decision in *Kimbrough*, rather than to grant it outright, it is thus unlikely that any relevant proceedings will take place in the district court during the pendency of the petition. For that reason, the interlocutory status of the petition should have no bearing on its disposition.

The effect of denying the petition in this case would be to leave the court of appeals' decision in place—a decision that the Court's decision in *Kimbrough* could render erroneous. The more orderly course of proceedings is for the Court to hold the petition until *Kimbrough* is decided. Should the Court rule in the government's favor in *Kimbrough*, it can grant the petition, vacate the court of appeals' erroneous decision, and remand for further proceedings; on remand, the court of appeals would presumably affirm petitioner's preexisting sentence, thereby terminating the case. Should the Court rule in the defendant's favor in *Kimbrough*, it can deny the petition at that point or vacate for further consideration, and resentencing in the district court can go forward, consistent with the legal standards articulated in the Court's opinion (which, of course, would take precedence over the court of appeals' opinion). In all events, there is no reason for the Court to depart from its ordinary practice of holding a petition for a writ of certiorari pending its decision on the merits in a case presenting an identical issue.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending this Court's decision in *Kimbrough* v. *United States*, No. 06-6330, and then disposed of accordingly.

Respectfully submitted.

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